No. 18209

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIAM J. WINEBERG and the ESTATE OF JANET R. WINEBERG, DECEASED, WILLIAM J. WINEBERG, EXECUTOR,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Appeal from the Tax Court of the United States

PETITION FOR REHEARING

Charles P. Duffy,
Davidson, Duffy & Stout,
1404 Standard Plaza,
Portland, Oregon 97204
Counsel for Petitioners.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-64

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Come now William J. Wineberg and the Estate of Janet R. Wineberg, Deceased, William J. Wineberg, Executor, the petitioners in the above-entitled proceeding, appearing by Charles P. Duffy, one of their attorneys of record, and respectfully present this petition for rehearing on the following grounds:

1. The Court concluded that "petitioner was engaged in the trade or business of selling timber" by interpret-

ing the phrase "trade or business" in the light of earlier cases on this subject, and did not mention nor apply the 1963 decision of the Supreme Court in *A. J. Whipple* v. *Commissioner,* 373 U.S. 193, 83 S. Ct. 1168, in which the Supreme Court concluded, once again, that there is a big difference between engaging in income-producing activities and being actively engaged in the pursuit of a trade or business. The *Whipple* decision was not mentioned in the briefs filed by the respective parties herein, since that case had not been decided by the time that the reply brief was due. It was called to the attention of the Court, however, at the time of the oral argument herein.

The phrase "trade or business" found in Section 117 (a) of the Internal Revenue Code of 1939, which defined "capital asset", is precisely the same phrase found in Section 23 (k) of the same Code, which was involved in the *Whipple* case. The Court stated:

> "Congress deliberately used the words 'trade or business', terminology familiar to the tax laws, (in enacting the bad debt provisions) . . . a concept which falls far short of reaching every income or profit-making activity."

The Court, in *Whipple,* made it clear that "investing is not a trade or business", and stated that:

> "As early as 1916, Congress . . . distinguished the broad range of income or profit-producing activities from those satisfying the *narrow category* of trade or business." (italics supplied)

In *Whipple,* the Commissioner of Internal Revenue argued successfully that "trade or business" embodied a very narrow concept. In the present case, the same

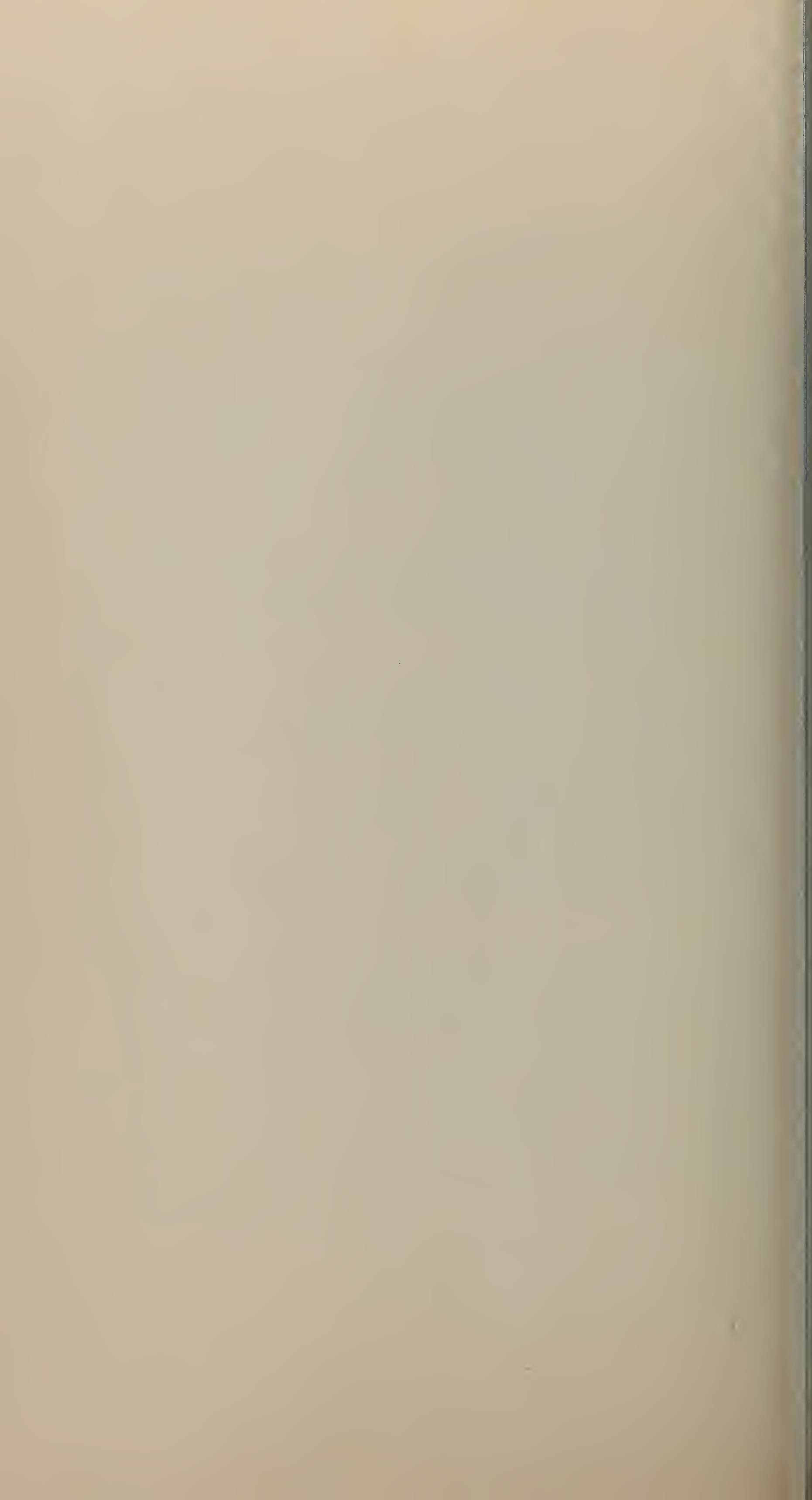
phrase appearing in Section 117(a) is applied with a broad brush in order to sustain the Commissioner's position here.

The Commissioner uses this phrase with a "heads I win, tails you lose" attitude. We submit that the Commissioner should not be permitted to blow hot and cold in applying this phrase. It is respectfully submitted that the opinion of this Court in the instant case will permit and encourage him to do so.

It is unfortunate that this Court has placed principal emphasis on the facts relating to the Wineberg Timber Company, as set forth in paragraphs 11 to 25, inclusive, of the factual statement in the opinion, since the record (R. 296) shows that petitioner "spent very little time in Newport, Oregon". Moreover, that office was maintained for the principal purpose of "administering certain contracts of sale and watching operations" in Lincoln County, Oregon, (R. 272, 295); namely, the Monroe contract and the Cascadia contract (R. 301-2).

2. With respect to issue No. 2, it is respectfully submitted that Section 117(k) merely enlarged the word "sales" to include dispositions which would otherwise not be sales, and that Section 117(j) granted capital gains on sales of timber under the enlarged definition of the word "sales". We believe that this follows from the opinion of this Court in *United States* v. *Giustina,* et al, 313 F.2d 710, decided December 17, 1962.

3. With respect to the Monroe Lumber Company-Kendall tract transaction, set forth on pages 17 to 19, inclusive, of the opinion of the Court, there is nothing



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BRIEF FOR THE PETITIONERS

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CHARLES P. DUFFY,
DAVIDSON, DUFFY & STOUT,
625 Yeon Building,
Portland 4, Oregon,
Counsel for Petitioners.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE 2-63

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BRIEF FOR THE PETITIONERS

OPINION BELOW

The memorandum, findings of fact and opinion of the Tax Court (R. 84-198) are not reported officially.

JURISDICTION

On May 11, 1962, the Tax Court of the United States entered its decision determining deficiencies in

income taxes and additions to the tax due from the petitioners as follows:

Year	Income Tax	Section 294(d) (1939 Code)
1950	$18,902.06	--
1951	32,562.22	--
1952	45,887.27	$9,318.96
1953	34,882.63	4,558.07

A timely petition for review thereof was duly filed with this Court on August 7, 1962 (R. 203). Jurisdiction is conferred on this Court by Sections 7482 and 7483 of the Internal Revenue Code of 1954.

SPECIFICATION OF ERRORS

1. The conclusions of law made by the Tax Court are erroneous in the following particulars:

(a) The Tax Court erred in its interpretation and application of Section 117(a) of the Internal Revenue Code of 1939.

(b) The Tax Court erred in its interpretation of, and failure to apply, the provisions of Sections 117(k) and 117(j) of the Internal Revenue Code of 1939.

(c) The Tax Court erred in its interpretation of, and failure to apply, the provisions of Section 112(b)(1) of the Internal Revenue Code of 1939 to certain exchanges of like properties by petitioners.

(d) In the alternative, the Tax Court erred in its interpretation of, and failure to apply, the provisions of Section 117(k)(2) of the Internal Revenue

Code of 1939 to certain dispositions of timber by petitioners.

(e) The Tax Court erred in its interpretation of, and failure to apply, the provisions of Section 23(o) of the Internal Revenue Code of 1939 to a charitable contribution made by petitioners in the year 1953.

2. The Findings of Fact made by the Tax Court are clearly erroneous in the following particulars:

(a) The Tax Court erred in determining that the timber sold or exchanged by petitioners during the taxable years was theretofore held primarily for sale to customers in the ordinary course of petitioners' trade or business, within the purview of Section 117(a) of the Internal Revenue Code of 1939.

(b) In the alternative, petitioners contend that the Tax Court erred in determining that the petitioners did not retain an economic interest in the disposition of certain timber during the taxable years, within the purview of Section 117(k)(2) of the Internal Revenue Code of 1939.

(c) The Tax Court erred in determining that certain "production royalties" received by petitioners during the years 1951, 1952 and 1953 constituted ordinary income to petitioners rather than long term capital gains.

(d) The Tax Court erred in determining that an amount received by petitioners in 1950 for use of a logging road constituted ordinary rental income

to petitioners, rather than long term capital gain from the grant of an easement.

(e) The Tax Court erred in determining that petitioners did not sustain a short term capital loss of $10,000 from the sale of certain shares of stock of Yaquina Bay Mills, Inc. in the year 1951.

(f) The Tax Court erred in determining that an amount paid by petitioners in 1953 to a church did not constitute an allowable charitable deduction.

3. The Tax Court erred in determining any income tax deficiency against petitioners for any of the years 1950 to 1953, inclusive, and erred in failing to find over-assessments for the years 1951, 1952 and 1953.

4. The Tax Court erred in imposing an underestimate penalty against petitioners for either of the years 1952 or 1953, under the provisions of Section 294(d) of the Internal Revenue Code of 1939.

STATEMENT OF THE CASE

The principal issue in this case is whether petitioners realized capital gains or ordinary income from the sale of certain tracts of timber during the years 1950 to 1953.

There is no real dispute as to the facts. Petitioner William J. Wineberg was and is an investor in many types of properties (R. 211). During the late 1920's (R. 87), the 1930's, and the early 1940's, he acquired a considerable number of tracts of timber, mostly in Ore-

gon and Washington, at property tax delinquency sales (R. 88, 266-7) at what now appear to be extremely low prices. The economic upturn and the resulting inflation during the years of World War II and thereafter caused stumpage prices to multiply by leaps and bounds. During the years 1950 to 1953 petitioners sold or disposed of less than eight per cent of their timber holdings (R. 93, 95-6, 212) to individuals or firms who approached the petitioners to acquire certain of the properties (R. 260).

None of the properties was advertised for sale (R. 259); no offers were solicited on any tract of timber; petitioners had no fixed price for the sale of such properties; in each instance the ultimate purchaser approached the petitioners to acquire the property; petitioners never improved any of the properties in any way; never constructed logging roads to any of the properties in order to make them more salable; posted no signs on any of the properties indicating that they were for sale; and employed no salesman to sell any of the tracts of timber (R. 260).

Despite these undisputed facts, Judge Irene F. Scott of the Tax Court held that the timber tracts in question were theretofore held by petitioners primarily for sale to customers in the ordinary course of business and were, therefore, not "capital assets" within the purview of Section 117(a) of the Internal Revenue Code of 1939. Reaching that conclusion, she reclassified the sale proceeds from capital gains to ordinary income.

There are certain subsidiary and relatively minor

issues involved in this case which will be discussed under the appropriate headings of the argument. These relate to questions of whether certain transactions constituted tax-free exchanges of "like kind" properties; whether certain "production royalties" received by petitioners during the years 1951, 1952 and 1953 constituted long term capital gains or ordinary income; whether the amounts received during 1950 for a logging road easement constituted ordinary rental income, rather than long term capital gains; whether petitioners sustained a short term capital loss from the sale of certain shares of stock in the year 1951; and whether the petitioners were entitled to a claimed charitable deduction in the amount of $5,000 made by them in the year 1953.

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1939:

Sec. 117(a)

"(1) Capital Assets.—The term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), or real property used in his trade or business;"

Sec. 117(j)

"(1) Definition of Property Used in the Trade or Business—For the purpose of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. . . . Such term also includes timber or coal with respect to which subsection (k)(1) or (2) is applicable."

Sec. 117(k)

"Gain or Loss in the Case of Timber or Coal.—

. . . . .

"(2) In the case of the disposal of timber or coal . . . held for more than 6 months prior to such disposal, by the owner thereof under any form or type of contract by virtue of which the owner retains an economic interest in such timber or coal, the difference between the amount received for such timber or coal and the adjusted depletion basis thereof shall be considered as though it were a gain or loss, as the case may be, upon the sale of such timber or coal. . . ."

Sec. 112(b)

"Exchanges Solely in Kind.—

"(1) Property Held for Productive Use or Investment.—No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for

property of a like kind to be held either for productive use in trade or business or for investment."

Sec. 23

"Deductions from Gross Income.—

"In computing net income there shall be allowed as deductions:

. . . . .

"(o) Charitable and Other Contributions. — In the case of an individual, contributions or gifts payment of which is made within the taxable year to or for the use of:

"(1) . . . . .

"(2) A corporation, trust, or community chest, fund or foundation, created or organized in the United States or in any possession thereof or under the law of the United States or of any State or Territory or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation."

SUMMARY OF ARGUMENT

None of the specific tracts of timber sold by petitioners during the taxable years before the Court were theretofore held by them primarily for sale to customers in the ordinary course of business. They were, therefore, "capital assets" in the hands of petitioners and the sales proceeds constituted capital gains.

It is respectfully submitted that the length of hold-

ing—an average of about eight years—and the lack of "busy-ness" on the part of petitioners in bringing about such sales, are the principal factors confirming the taxpayers' contention that the timber in question was acquired and held for investment.

Most of the tracts of timber in question were acquired prior to World War II at property tax delinquency sales for prices that now appear to be very low. Despite the tremendous increment in timber stumpage values brought on by the wartime inflation, petitioners disposed of only a small percentage of their timber holdings during the taxable years before the Court and still retain most of their timber to this date, despite numerous offers.

It is true that petitioner William J. Wineberg had a number of transactions with the logging and lumber industry during these years, but had even more numerous transactions in the stock market, as evidenced by his income tax returns. The respondent, inconsistently, has made no effort to reclassify the proceeds of such gains from the sale of corporate stock. Petitioners had investments in many areas and in many fields of endeavor (Exs. 1-A, 2-B, 3-C, 4-D). In any event, petitioners respectfully submit that whether land or timber constitutes a capital asset in the hands of a given taxpayer depends not on *who* owns the land or timber, but on *how* it is held. Land or timber is either held for investment and is a capital asset or is held for sale to customers in the ordinary course of the taxpayer's trade or business. We believe that nothing in the record

supports respondent's contention and the determination by the Tax Court that petitioner was a "dealer", but it should be unimportant to what extent the taxpayer may have been in the timber business; the sole question should be whether the property from which the gain was derived was within the statutory definition of a capital asset.

It is readily apparent that petitioners were holding the property and not selling it because they expected the property to further appreciate in value and thus increase the profit that they would ultimately receive upon the disposition thereof. This is the characterstic of an investor—not a "dealer".

In the alternative, petitioners contend that a proper interpretation and application of Sections 117(j) and 117(k) of the Internal Revenue Code of 1939 would grant them capital gains on all timber sales, regardless of the purpose for which the timber was held.

The subsidiary issues are discussed under the separate headings of Sections III to VIII, inclusive, of the Argument.

ARGUMENT

I.

None of the specific tracts of timber in question were held by petitioners primarily for sale to customers in the ordinary course of business, within the purview of Section 117(a)(1) of the Internal Revenue Code of 1939.

For the convenience of the Court, we have included herein, as Appendix A, a brief summary of the timber transactions which are in dispute. It will be noted that

these tracts were held by the petitioners for an average of about eight years and that some of the "sales" were caused by unauthorized trespassers cutting their timber.

Petitioners also sold or disposed of other timber during the years 1950 to 1953 under contracts by which they retained an economic interest in the timber, within the purview of Section 117(k)(2) of the Internal Revenue Code of 1939. These transactions are summarized in Appendix B hereto. The respondent has not questioned the petitioners' right to capital gains treatment of these amounts.

Like the numerous lots purchased by the taxpayers in *W. E. Starke* v. *Commissioner,* — F.2d —, decided by this Court on January 10, 1963 (No. 17,337), and *Austin* v. *Commissioner* (1959), 263 F.2d 460, most of the properties were acquired by petitioners at tax delinquency sales in the late 1920's, the 1930's or early 1940's (R. 266-7).

The petitioner William J. Wineberg testified that each property was acquired and held strictly for investment purposes (R. 256-7). We anticipate that respondent will seek to discount this testimony of the petitioner as being self-serving, but the Commissioner offered no evidence to the contrary. Cf. *Ross* v. *Commissioner,* 5 Cir., 227 F.2d 265, cited in *Starke* v. *Commissioner,* supra. In any event, there should be no dispute between the parties that no property was advertised for sale; no offers were solicited on any tract of timber; petitioners had no fixed price for the sale of such properties; in each instance the ultimate purchaser

approached petitioners to acquire the property; petitioners never improved any of the properties in any way; petitioners never constructed logging roads to any of the properties in order to make them more salable; petitioners posted no signs on any of the properties indicating that they were for sale; and petitioners employed no salesmen to sell any of their tracts of timber (R. 259-260).

In dispute is the nature of the proceeds of the sale of some twenty-seven tracts of timber during the four years in question, five of such sales being of an involuntary nature caused by unauthorized trespasses. With respect to the latter, the Tax Court even seems to have held that the petitioners were holding their properties for sale to such trespassers.

The most recent decision of this Court on this general issue was in the case of *W. E. Starke* v. *Commissioner,* — F.2d —, decided January 10, 1963 (No. 17, 337). It is interesting to note that Judge Scott relied on the *Starke* case (R. 169)—prior to its reversal by this Court—in deciding the instant case. The Court will recall that the taxpayer in that case was a lawyer who had acquired a great many lots at property tax delinquency sales through the medium of improvement bonds. The tax years 1953 to 1955, inclusive, were involved in that case, and the profit from the sales of real property in those years far exceeded the net income of the taxpayer from his law practice. In addition to the sales of real property during the taxable years before the Court, the taxpayers had sold a number of lots,

both prior to those years and subsequent thereto. As the Tax Court pointed out in its opinion, 35 T.C. 18, at 24, the petitioner received profits during 1953 from 81 installment sales made prior to 1953. At page 26 of its opinion, the Tax Court recites the fact that Mr. Starke, during the year 1953, made a total of 68 real property transactions involving 139 lots. In 1954, he had a total 41 transactions involving 89 lots, and in 1955 there was a total of at least 25 sales involving 59 lots. In the next year, the large number of sales continued, there being 25 sales involving a total of 80 lots. The taxpayer argued unsuccessfully in the Tax Court that he devoted most of his time to his law practice, but the Tax Court stated:

> "We think there was certainly 'busyness' on the part of the petitioner in the acquisition and sale of the large number of lots dealt with in the years in question and prior thereto. The petitioner, either personally or through his secretary, was consistently engaged in the activity of acquiring title to lots, discussing proposed sales, and transferring title to lots. A lack of 'busyness' with respect to solicitation of purchasers is not decisive where, as here, there was a seller's market and purchasers sought out the petitioner."

The Tax Court refused to follow the earlier decision of this Court in *Austin* v. *Commissioner,* 263 F.2d 460, which had reversed an earlier opinion of the Tax Court. On appeal, this Court, in the *Starke* case, reversed the Tax Court again and held, for the following reasons, that the taxpayer was entitled to capital gains treatment of the proceeds from the numerous sales of lots:

> "The days that Starke must have been waiting

for came in the war time years of 1941-1945 and again in 1953, 1954 and 1955. San Diego was experiencing an economic upturn which brought lot buyers to Starke's door. He had the lots. They bought, and he sold. There was considerable profit. Starke, in 1953 and thereafter, continued to treat his profits as capital gains, as he had done through the preceding years. But the commissioner has taken the position for the years 1953, 1954 and 1955 that Starke was in the business of selling lots: ergo, he must treat the profit as ordinary income and cannot retain his own theory of capital gains. On redetermination, the tax court has sustained the commissioner. Its decision, 35 T.C. 18, is here for review. We agree with the taxpayer.

. . . . .

"No one element is dispositive. But here there is no evidence of a campaign to sell, no advertising, no 'holding out'. Purchasers had to find Starke. Certainly prior to 1941-1945 and 1952-1955 one would be hard pressed to say Starke was in the business of selling lots. We do not think under all of the circumstances that his decision to unload in the sellers market of 1953-1955, when buyers came to his door, should charge Starke with an interlude of business. True, his profit is measured by the year, but 'business' as distinguished from 'investment' should be measured by the course of the known years. It is in measuring the whole course here that we conclude he had investment. The active business shown by Starke was that of a practicing lawyer. We believe had the taxpayer been involved in the same number of stock purchases and sales at the same costs and selling prices on the same dates, no one would have questioned his right to capital gains."

Unlike *Starke* and *Austin,* petitioner William J. Wineberg was not a member of the bar. He was and is an investor (R. 211) or, if you will, a capitalist. It is

submitted that his relationship to the properties was as passive as the lawyer's in those cases.

It is true that petitioner William J. Wineberg made a certain number of timber sales during the years in question, but it is equally true that he made numerous and more frequent sales of corporate securities on the stock exchange during these years. An examination of the income tax returns of petitioners for the years in question (Exs. 1-A, 2-B, 3-C and 4-D) indicates that the petitioners were actively engaged in buying and selling in the stock market—not in selling timber. For example, in filing their joint income tax return for the year 1950 (Ex. 1-A), petitioners reported nine sales of timber during such year, which were reported by them as long-term capital gains. The gross selling price of these tracts of timber was $95,526.11. Petitioners also reported six small sales of real property during that year, with the selling prices aggregating $16,715.45. During the same year, petitioners reported 37 separate sales of corporate securities for sales prices aggregating $190,-284.86, as long-term capital gains, and also reported 9 separate other sales of corporate securities as short-term capital gains, with aggregate sales prices of $28,161.73. Respondent, although reclassifying the gain on the outright timber sales as ordinary income, approved the capital gain treatment of the security sales despite the number of the sales and the dollar amounts involved therein.

The returns filed by petitioners for these years indicate that they had widely diversified investments during

this period. The 1953 return (Ex. 4-D) shows dividends received from 58 different corporations, rentals received from various properties, the operation of a dairy and farm, and even a race horse venture. We recognize the fact, as indicated in the *Starke* decision, that a taxpayer may be in many active businesses all at the same time and all of his businesses be subject to ordinary income rates without capital gains treatment. On the other hand, as this Court pointed out in *Austin* v. *Commissioner,* 263 F.2d 460:

> "Carrying on a business, however, implies an occupational undertaking to which one habitually devotes time, attention or effort with substantial regularity. Merely disposing of investment assets at intermittent intervals, without more, is not engaging in business, even though some preliminary effort is necessary to render the asset saleable."

In the *Austin* case, supra, the petitioner had made 94 sales of real property in 10 years, and the Tax Court found that there appeared to be a more or less consistent activity in the sale of lots over a period of years, resulting in a steady flow of income. The Tax Court noted that petitioner's net profits from real estate sales were substantially in excess of the net collections from his law practice and that he must have spent considerable time in his law office drawing up sales contracts. The Tax Court rejected the petitioner's arguments that he did not advertise the lots which were, in fact, sold, upon the theory that the seller's market made such activity unnecessary. In reversing the Tax Court, this Court, citing its earlier decision in *Palos Verdes Corp.* v. *United States,* 201 F.2d 56, stated:

> "It is sound law that holding an asset for many years indicates an intention to hold for investment, rather than for sale, (citations) and the long period of holding assets without being disposed of violates the concept of an organized business with respect thereto." (citations)

Commenting specifically on the contrary findings of the Tax Court in the *Austin* case, this Court declared:

> "Petitioner did nothing to attract prospective buyers. Prospective buyers after checking with tax rolls would seek out the petitioner. The only time or effort devoted by petitioner was after he had been sought out by prospective purchasers or their brokers, and such time and effort related only to negotiations carried on, mostly over the telephone, as to sales prices and terms. The transactions were consummated by title companies. There is nothing in the record to suggest that such negotiations were extensive or required much effort or time.
>
> "The profits realized by petitioners, as well as the sales, were not the result of any efforts expended by petitioner. After 1945 there was a large amount of real estate development in Manhattan Beach. Persons were seeking to buy lots there, and as a result of such demand petitioners were able to sell lots at substantial prices which he had purchased for relatively small sums or acquired in payment of legal fees. This increase in prices bore no relationship to petitioner's investment or the time he devoted to consummate sales."
>
> * * * * *
>
> "It is our view, based upon the entire record, that petitioner was not engaged in the business of selling real property during the tax years in question, and that the properties sold were not being held primarily for sale to customers. The conclusion of the Tax Court in our opinion is clearly erroneous, and on the entire record a mistake has been made. . . ."

We recognize that the *Starke* opinion expressly declared that it did not "impair the validity" of the following earlier cases in which this Court had held that sales of varying volume were in the ordinary course of business and the proceeds therefrom not entitled to investment treatment: *Rollingwood* v. *Commissioner,* 190 F.2d 263; *Cohn* v. *Commissioner,* 226 F.2d 22; *Homann* v. *Commissioner,* 230 F.2d 671; *Pool* v. *Commissioner,* 251 F.2d 233; *Rubino* v. *Commissioner,* 186 F.2d 304; and *Stockton Harbor Industrial Company* v. *Commissioner,* 216 F.2d 638.

Rollingwood involved the sale of more than eight hundred homes, over a four-year period, which had been constructed in a World War II housing project. The taxpayer stated that its business was "Development of subdivision and selling of homes to defense workers" (1950 TC Memo. Dec., Par 50,180). *Cohn* also involved a subdivider who built war housing units which were sold shortly after they were completed—at least, as soon as the wartime restrictions were lifted. *Homann* also involved eighty-five houses constructed in 1945 for war workers. They were sold in the following year, after removal of wartime restrictions. *Pool* involved taxpayers who were " 'speculative builders' of homes for profit, which were disposed of as quickly as possible after they were built". There was substantial selling activity. *Rubino* was the per curiam affirmance by this Court of a memorandum decision of the Tax Court in which the taxpayer stated on his income tax return that he was "engaged in building homes for sale and on contract". *Stockton Harbor* had previously filed

a document with the Bureau of Internal Revenue, stating that "the real properties of the corporation are held primarily for sale" and the evidence indicated a substantial sales effort to dispose of a large industrial tract to various customers. In each of these cases, the holding period was not more than one or two years and, in each instance, the evidence showed that only wartime restrictions and conditions prevented even earlier sales. The decisions in those cases should be compared to the war-rental housing case of *McGah* v. *Commissioner,* 210 F.2d 769, decided by this Court in 1954. In that case, it was noted that the taxpayer still was renting approximately one third of its houses and disposed of the remaining portion in order to reduce its indebtedness. The retention of a substantial portion of the rental units is, we believe, similar to the retention by the petitioner William J. Wineberg of more than nine tenths of his timber "despite a ready market and opportunity to realize large profits", as in the *McGah* case.

The average holding period of the properties disposed of during the taxable year and which are in dispute here (Appendix A) was approximately eight years. The average holding period in *Starke,* supra, was about ten years. It is readily apparent that petitioner contemplated holding these properties for a great many years and that only the phenomenal rise in the value of stumpage caused him to dispose of some of his total holdings to persons or firms who sought him out and offered to buy.

Was there any "busy-ness" on the part of petitioner

in bringing about the sale of these tracts of timber? What he *didn't* do is set out in the first part of this argument. Petitioner testified that he never saw most of the properties (R. 253). However, we anticipate that respondent will point to the frequent timber sales by petitioner during this period (but not nearly so numerous as the sales in *Starke or Austin*); the fact that petitioner had a real estate salesman's license at one time (but not since the year 1926—Ex. 43-QQ, R. 264, 302); the fact that petitioner personally approved all sales (R. 287)—any investor in the stock market does the same; the fact that petitioner required purchasers of timber, where he retained the land, to follow good forest practices; and the fact that petitioner expended funds for reseeding and pest control (R. 294-5). These, however, would appear to be attributes of the investor —not the dealer. It takes forty to seventy years for a crop of timber to grow (R. 301).

We also anticipate that respondent will contend that there was "busy-ness" on the part of petitioner in the operation of the one-room office of "Wineberg Timber Co." at Newport (Lincoln County), Oregon (R. 271), which was managed by one Ellis Moses, an employee of petitioner (R. 347). "Wineberg Timber Co." was a name assumed by petitioner in 1952 (R. 347) or 1953 (Ex. 40-NN) for the principal purpose of "administering certain contracts of sale and watching operations" in Lincoln County, Oregon (R. 272, 295), namely, the Monroe contract and the Cascadia contract (R. 301-2). During the year 1952, petitioner had log (not timber) sales of $165,000 (Ex. 3-C) and in 1953 he had

log and lumber sales of $194,000 (Ex. 4-D), all of which were reported by petitioners as ordinary income. These were from selective cutting contracts (R. 270) which required supervision. Trespasses on the timber had to be ascertained and settled (R. 262); reseeding and forest sanitation was necessary to preserve petitioner's timber holdings (R. 295); and petitioner was always desirous of acquiring more logged-off land or land and timber adjoining his holdings (R. 283, 286).

Although petitioner maintained a desk in his home (R. 306), in Vancouver, Washington, the Newport, Oregon, office received many inquiries for different tracts of land or timber owned by the petitioner (R. 348). Respondent's witness, Ellis Moses, testified, however, that there was no advertising for sale of any timber or land (R. 353). Petitioner William J. Wineberg "spent very little time in Newport, Oregon" (R. 296).

By its decision in *Ah Pah Redwood Company* v. *Commissioner,* 251 F.2d 163, this Court remanded to the Tax Court for further decision as to whether the taxpayer in that case was holding certain timber primarily for sale to customers in the ordinary course of its trade or business. The articles of incorporation of the corporate taxpayer in that case stated that it was formed "to engage in the business of buying, selling, and owning timber and of carrying on a general logging and lumber business." The Tax Court also found that "this purpose included the manufacturing, selling, processing, and shipping of lumber and related products; the construction, ownership, and operation of sawmills,

tanbark mills, and pulp mills, as well as tramroads, railroads and steamships; and the acquisition, holding, improving, encumbering, developing, and exchanging of real and personal property of every kind." On remand, the Tax Court (TC Memo 1959-44) made the following ultimate finding:

> "Petitioner did not advertise the Sage timber for sale. It did not employ salesmen and it did not solicit offers from buyers. Nor did petitioner log or mill the Sage timber. It had no logging equipment and no sawmill and did not log timber or manufacture lumber during the taxable years.
>
> "Throughout the years 1948 and 1949 petitioner did not hold the Sage timber primarily for sale to customers in the ordinary course of its trade or business."

We respectfully submit that in the instant case there was no evidence of any holding of the properties for sale to customers in the ordinary course of business. The only way in which the petitioners could have been less active in the transactions would have been for them to have refused to make any sales whatsoever.

The taxpayers who were involved in the recent decision of the Court of Claims in *Scott et al* v. *United States* (1962), 305 F.2d 460, had made twenty-four purchases of timberlands in the State of Oregon, involving twenty-five tracts of timber, during the years 1944 through 1949 at a total cost of approximately $146,000. From 1944 through 1952, in fourteen transactions, the parties sold the twenty-five tracts for a total selling price in excess of $800,000. As in the instant case, the Commissioner of Internal Revenue took the position

that the timberlands were theretofore held by the taxpayers primarily for sale to customers in the ordinary course of business. In rejecting this contention by the Commissioner and deciding in favor of the taxpayers, the Court of Claims stated:

> "Obviously plaintiffs acquired this property for sale but we do not think they acquired or held property 'primarily for sale to customers in the ordinary course of his trade or business,' as stated in the statute. . . .
>
> "No one factor, obviously, is determinative of whether or not property is held primarily for sale to customers in the ordinary course of one's trade or business. But, among the factors regarded by the courts as important are the activities of the taxpayer, or his agents, in promoting sales, the extent of the development and improvement of the property, the purpose for which the property was acquired, and the frequency and continuity of sales."

Like the petitioners in the instant case, the Court of Claims found that no effort was made by the taxpayers to develop or improve the property, no roads were built to or on the timberlands, and no logging operations were ever conducted thereon by the parties. The Court then made the following significant observation:

> "The price of timber rose so rapidly after the war from 1946 until 1952 that it was possible to sell the timberlands at substantial profit after much shorter holding periods than was anticipated when the tracts were purchased. . . .
>
> "The average holding period for all the tracts purchased between 1944 and 1949 and sold between 1946 and 1952 was 34 months. Timberlands of the type purchased under the agreement between plain-

> tiffs and McFadon were held by their owners for ten to twenty years or longer. However, the rapid rise in the price of timber after World War II made it possible to make profitable disposition of timberlands after shorter holding periods than had been anticipated when the earlier purchases had been made under the agreement. The profit realized from these sales by plaintiffs was not due to any business activity by plaintiffs; it resulted from this rapid rise in the price of timber which had been purchased as a capital asset investment, and not 'primarily for sale to customers in the ordinary course of (their) trade or business' as defined in the Internal Revenue Code of 1939, Section 117."

II.

In the alternative, the Tax Court erred in its interpretation of, and failure to apply, the provisions of Sections 117(k) and 117(j) of the Internal Revenue Code of 1939.

The intent of Congress to grant capital gains on timber by the 1943 enactment of Sec. 117(k) and the contemporaneous technical amendment of Sec. 117(j) of the Internal Revenue Code of 1939, appears from the following portion of Senate Report No. 627, 78th Congress, 1st Sess., pages 25-26:

> "*In short, if the taxpayer cuts his own timber, he loses the benefit of the capital gain rate which applies when he sells the same timber outright to another.* Similarly, owners who sell their timber on a so-called cutting contract under which the owner retains an economic interest in the property are held to have leased their property and are, therefore, not accorded under present law capital gains treatment of any increase in value realized over the depletion basis.

"In order to remedy this situation, it is proposed to amend the existing law, as follows:

* * * * *

"If an owner of timber disposes of it under a contract by virtue of which he retains an economic interest in such timber, the amount received by such owner is to be treated in a similar manner." (i.e. as a gain or loss upon the sale of the timber.)

"This latter provision will afford relief to those who have leased their property under a contract whereby they retain an economic interest in the timber and are not entitled under the present law to capital gains treatment *because of that fact.*" (Emphasis supplied)

Section 117(j), as amended in 1943, provided capital gains treatment on net gains from the sale of real or depreciable property used in the trade or business of the taxpayer and held for over six months. While the term "property used in the trade or business" excludes property held by the taxpayer primarily for the sale to customers in the ordinary course of his trade or business, such term (by the 1943 amendment) includes timber, with respect to which Subsection (k)(1) or (k)(2) applies, without any exclusion for property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

Respondent should agree that Section 117(j) grants capital gains on sales of timber, with respect to which Subsection (k) applies, regardless of the nature of the taxpayer's business. Petitioners contend that Section 117(k) applies to their timber sales, whether or not an economic interest was retained. Subsection (k)(2) only provides that a disposal of timber held for more than

six months, with an economic interest retained, shall be considered as though it were a sale of such timber, and Section 117(j) provides capital gains for timber to which Section 117(k) applies. Subsection (k) uses the word "sale", as well as the term "disposal with an economic interest retained". When considering this statute along with the Senate Finance Committee report at the time of its adoption, it appears that Congress intended to put disposals of timber with an economic interest retained in exactly the same category as sales of timber. There is, however, nothing to indicate that Congress intended to give an advantage to taxpayers disposing of timber with an economic interest retained, as compared to taxpayers who sell their timber outright.

It will be noted that the petitioners made other sales of timber during the taxable years (Appendix B) but retained an economic interest therein, thus qualifying for capital gains treatment under Section 117(k)(2). The respondent does not question this. Respondent's theory seems to be that one can make thousands of disposals with an economic interest retained and receive capital gains, whereas if he makes a few real sales, Section 117(k) is not applicable.

Literally, a disposal with an economic interest retained is not a sale, but Congress provided in Section 117(k) that it would be considered as though it were a sale. It is unlikely that Congress intended to grant capital gains on disposals with an economic interest retained and deny capital gains for actual sales.

If Congress intended to provide capital gains only

to taxpayers who were not dealers and who either cut their own timber or disposed of the same by contract under which they retained an economic interest, then the addition of Section 117(k) to the Internal Revenue Code of 1939, without any amendment to Section 117(j), would have clearly accomplished this purpose. Then gains to anyone who disposed of timber, whether by outright sale, by cutting his own or by contract by which he retained an economic interest, would be determined to be capital gains or ordinary income under Section 117(a). However, Congress went further and amended Section 117(j) granting capital gains on all gains from disposals of timber to which Section 117(k) applies, regardless of the nature of the taxpayer's business or the purpose for which the timber was held.

Petitioner's interpretation of Section 117(j) and (k), together, is that Section 117(k) merely enlarged the word "sale" to include dispositions that otherwise would not be sales, and that Section 117(j) granted capital gains on sales of timber under the enlarged definition of the word "sales". Therefore, petitioners submit, in the alternative, that they were entitled to capital gains treatment of the proceeds from all timber sales, whether they held the timber for investment, as they contend, or for sale, as respondent contends.

III.

The Tax Court erred in its failure to apply the provisions of Section 112(b)(1) of the Internal Revenue Code of 1939 to certain exchanges during the taxable years of like properties.

The 1950 transaction with Wrenn Planing Mill (R. 103-4), the 1951 transaction with Monroe Lumber Co. (R. 107-110), the 1952 transaction with Springfield Plywood Co. (R. 111-113), and the 1953 transaction with Pritzlaff and Wilson (R. 113-121) each qualified as a nontaxable exchange of like properties, within the purview of Section 112(b)(1) of the 1939 Internal Revenue Code, except to the extent of boot received in such exchanges, which boot was duly recorded by petitioners on the returns filed by them for the respective years (Exs. 1-A, 2-B, 3-C, 4-D).

Section 112(b)(1) of the Internal Revenue Code of 1939, applicable to the tax years in question, provided as follows:

> "Property held for productive use or investment—no gain or loss shall be recognized if property held for productive use in trade or business or for investment . . . is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment."

The Tax Court did not determine that these were not, in fact, true exchanges of properties of "like kind". The Tax Court stated:

> "We have held that petitioner's timber, in each of the years here involved, was held by him primarily for sale to customers in the ordinary course of

his trade or business and not for investment. Therefore, since the property transferred by petitioner was not held by him for productive use in his trade or business or for investment, the transactions result in recognizable gains. Cf. *Regals Realty Co.* v. *Commissioner,* 127 F.2d 931 (C.A.2, 1942) affirming BTA 194 (1940).

"It is, therefore, unnecessary to pass upon other contentions made by respondent. We sustain respondent's determination with respect to each of the claimed exchanges." (R. 174)

This issue is directly related, therefore, to the primary issue as to whether or not the specific tracts of timber sold or exchanged by petitioners during the taxable years were theretofore held primarily for sale to customers in the ordinary course of business. Petitioners respectfully request that, if this Court finds that petitioners are entitled to prevail on the primary issue, the case be remanded to the Tax Court for a further determination as to whether or not these were, in fact, true exchanges of like properties, within the purview of Section 112(b)(1) of the Internal Revenue Code of 1939.

IV.

The Tax Court erred in its interpretation of the contract between petitioners and one J. L. Ledgett and erred in failing to apply the provisions of Section 117(k)(2) of the Internal Revenue Code of 1939 thereto.

On November 10, 1952, petitioner William J. Wineberg entered into an agreement with one J. L. Ledgett (R. 122-125, Ex. 10-J) under the terms of which petitioner

sold to Ledgett for $30,000 all of the merchantable timber on certain real property owned by petitioners in Linn County, Oregon. Petitioners received a $5,000 payment on the purchase price upon execution of the contract, and the balance of $25,000 was paid to them during the year 1953 (R. 122). The agreement is set forth on pages 122 to 124, inclusive, of the transcript of the record.

As the agreement indicates, the balance of the purchase price was payable by the purchaser, J. L. Ledgett, at the rate of $20 per M for all saw logs removed from the tract and at the rate of $35 per M for all peeler logs removed from the tract, with petitioners retaining an economic interest in the timber until the purchase price was paid.

For the reasons stated under section I of the Argument herein, petitioners contend that the property in question was not held by them theretofore primarily for sale to customers in the ordinary course of business, but in the alternative, petitioners contend that the contract with J. L. Ledgett provided for the retention by the petitioners of an economic interest in said timber, thus qualifying for the treatment of the proceeds therefrom in accordance with the provisions of Section 117(k)(2) of the Internal Revenue Code of 1939.

An examination of the agreement (R. 122-124 (Ex. 10-J) reveals the fact that this was a "pay-as-cut" contract in which the petitioners retained an economic interest in the timber within the purview of the code section referred to above. Particular reference should be

made to paragraph 10 (R. 124) of the agreement with Ledgett in which the petitioners reserve the right to cancel the rights of the purchaser in the event of any default in the making of the payments.

It is recognized by this Court, *Ah Pah Redwood Co. v. Commissioner,* 251 F.2d 163, and by respondent (Rev. Rul. 57-90, 1957-1 CB 199) that if a taxpayer otherwise conforms to the requirements of Section 117(k)(2), he is entitled to capital gains treatment thereunder, notwithstanding that he was holding the timber disposed of primarily for sale to customers in the ordinary course of business.

We submit that an examination of the agreement will show that the petitioners had, in fact, retained an economic interest therein within the purview of this code section. The balance of the purchase price was to be paid by J. L. Ledgett as he sold the logs and, because of the financial condition of Ledgett (R. 239), petitioners believed that he could not pay for the timber until he cut the same and sold the logs. Contrary to the conclusion of Judge Scott (R. 179) petitioners were dependent upon the severance and sale of the timber for a return of their investment. Petitioners were, of necessity, looking to the cutting of this timber for the payment of the purchase price (R. 239), and the retention by the petitioners of an economic interest in said timber appears to be self-evident.

It is submitted that this transaction is entitled to capital gains treatment.

V.

The Tax Court erred in determining that certain "production royalties" received by petitioners during the years 1951, 1952 and 1953 constituted ordinary income to petitioners rather than long term capital gains.

On July 5, 1951, petitioners entered into an agreement with Cascadia Lumber Company (R. 126-133, Ex. 54), providing for the sale by petitioners to Cascadia Lumber Company of certain timber then owned by petitioners. The purchase price to be paid to petitioners was computed on a basis of certain dollar amounts per thousand board feet of such timber, and the agreement also provided that the purchaser of the timber would pay to petitioners the additional sum of 75¢ per thousand board feet for all lumber manufactured at the mill of Cascadia Lumber Company. On the same day, petitioner William J. Wineberg entered into a related and similar agreement with Yaquina Bay Mills, Inc. (Ex. 55), by the terms of which that corporation agreed, inter alia, to pay to petitioners additional sums equal to 75¢ per thousand board feet on all lumber surfaced or processed at the plant of said corporation.

During the years 1951 to 1953, inclusive, petitioners received the following amounts (which were determined by the quantity of lumber manufactured in the sawmill of Cascadia Lumber Company or surfaced in the planing and remanufacturing mill of Yaquina Bay Mills, Inc., as stated in the preceding paragraph) which were inadvertently and erroneously reported on the petition-

ers' income tax returns filed for said years as ordinary income "production royalties", rather than as long term capital gains;

Year	Amount
1951	$ 9,008.15
1952	15,314.76
1953	17,774.55

(R. 133, Exs 2-B, 3-C, 4-D)

The facts relating to to this item are set forth more fully in the record at pages 126 to 133, inclusive.

By appropriate amendments to their petition to the Tax Court filed by petitioners at the close of the hearing, petitioners alleged that the amounts stated above should have been reported by them as long term capital gains, and their taxable income for such years should have been reduced accordingly.

Examination of the agreement (Ex. 54) reveals the fact that this was a "pay-as-cut" contract in which the petitioners retained an economic interest in the timber, within the purview of Section 117(k)(2) of the Internal Revenue Code of 1939. As this Court stated, in *Ah Pah Redwood Co.* v. *Commissioner*, 251 F.2d 163:

> "A taxpayer is entitled to capital-gains treatment of income derived from the disposal of timber under Section 117(k)(2), without regard to the purpose for which the timber was held, provided the taxpayer satisfies the other requirements set forth in the cited statutes."

A further examination of these two agreements (Exs. 54 and 55) shows that these so-called "production royalties" were, in fact, additional amounts being paid to petitioners for their timber (R. 128). Respondent has

not questioned the right of petitioners to capital gains treatment of the other proceeds from the timber. It would appear, therefore, that the so-called "production royalties" from Cascadia Lumber Company and Yaquina Bay Mills, Inc., received by petitioners pursuant to the terms of these agreements were entitled to capital gains treatment just as were the amounts received directly for the sale of the timber, whether or not the petitioner William J. Wineberg was a "dealer", as contended by respondent.

VI.

The Tax Court erred in determining that petitioners did not sustain a short term capital loss of $10,000 from the sale of certain shares of stock of Yaquina Bay Mills, Inc. in the year 1951.

The evidence relating to the disposition of petitioners' shares of stock of Yaquina Bay Mills, Inc. is set forth in detail on pages 137 to 151 of the transcript of the record. The contentions by the respondent in the court below, that petitioners' claimed basis for the stock was understated and that they did not have the requisite six months holding period prior to disposition thereof, were determined against respondent by the Tax Court and are no longer in controversy.

The petitioners contend, however, that the Tax Court erred in failing to find (R. 189-191) that they sustained a short term capital loss on the disposition in 1953 of the remaining 675 shares of such stock. The parties are agreed that the cost basis to petitioners was

$81,000. It is petitioners' contention that the selling price of certificate No. 5 for 675 shares was $71,000. This is exactly what the agreement between George F. Miller Lumber Co. and petitioner (Ex. 39-MM) says. The Tax Court, however, refused to give effect to the purchase price allocation. (R. 190) Respondent called Mr. George E. Miller as a witness, who testified:

> "Well, there were weeks or months of negotiations and it wasn't just a deal overnight. It was sort of a complicated deal but the paper that we signed would have to confirm just what it is." (R. 408)

Unless the agreement between these unrelated parties is ignored, the tax consequences of the sale of the 1350 shares of Yaquina Bay Mills, Inc. by petitioners in 1951 should be as follows:

Date Acquired	Date Sold	No. Shares	Cost	Selling Prices	Profit or Loss
6/50	3/51	375	$ 33,333.75	$ 52,500.00	$19,166.25
6/50	5/51	300	29,166.25	101,500.00	72,333.75
3/51	5/51	675	81,000.00	71,000.00	(10,000.00)
		1350	$143,500.00	$225,000.00	$81,500.00

Petitioners submit that they sustained a short term capital loss of $10,000, in addition to the long term capital gains as indicated above.

VII.

The Tax Court erred in determining that an amount received by petitioners in 1950 for use of a logging road constituted ordinary rental income to petitioners rather than long term capital gain from the grant of an easement.

In 1944, petitioner William J. Wineberg had acquired certain timberlands in Lincoln County, Oregon, which were the subject of a contract of February 10, 1950 (R. 136, Ex. 8-H) with Monroe Lumber Company. Under the terms of that contract, Monroe Lumber Company agreed to pay to petitioner the sum of $4,000 for logging roads theretofore constructed by a previous contract purchaser of the property which had defaulted on its contract (R. 136). The $4,000 received by petitioners for the sale of such improvements to Monroe Lumber Company was reported on their 1950 income tax return (Ex. 1-A) as a long-term gain from the sale of a capital asset and did not represent "road rentals" as determined by the Tax Court. Petitioners respectfully submit that the agreement shows that petitioners granted an easement to Monroe Lumber Company and that the proceeds from the grant of such an easement are entitled to capital gains treatment.

The pertinent parts of the agreement of February 10 1950, between petitioner and Monroe Lumber Co. (Ex. 8-H) are as follows:

> "2. The *seller hereby gives and grants to the buyer,* his agents and servants, *the right, privilege and easement* to enter upon said lands to log, cut and remove said timber

therefrom and to place and install upon said lands whatever equipment and machinery may be necessary to conveniently log said timber and to harvest, process logs from said lands. Said rights and easements to terminate upon the complete removal of said timber or upon the termination or cancellation of this contract as hereinafter provided. (Emphasis supplied.) . . .

"10. The buyer agrees to pay the seller upon demand the sum of Four Thousand ($4,000.00) Dollars as compensation for roads established by the seller and roadwork performed by the seller, buyer to have the unrestricted use of such roads during the life of this contract."

The uncontradicted testimony of petitioner William J. Wineberg on this transaction is to be found on pages 223 to 227, inclusive, of the Transcript of Record.

Under the applicable law, an easement constitutes an interest in land. *Steelhammer* v. *Clackamas County,* 170 Or. 505, 135 P.2d 292. The grantee of an easement is the "owner" of the incorporeal interest created by the grant. *Oregon* v. *The California-Oregon Power Company,* 225 Or. 604, 358 P.2d 524.

As the respondent has stated in his own Revenue Ruling 59-121, 1959-1 CB 212:

> "The consideration received for the granting of an easement with respect to land constitutes the proceeds from the sale of an interest in real property. The amount received should be applied as a reduction of the cost or other basis of the land subject to the easement. Any excess over basis constitutes recognized gain."

When respondent determined that the $4,000 re-

ceived by petitioners "as compensation for use of roads", he would appear to be attempting to rewrite paragraph 10 of the February 10, 1950 agreement to read:

> ". . . as compensation for (the use of) roads established by the seller . . ."

It is submitted that the agreement in question provided in part for the granting of an easement to Monroe Lumber Co. and that the proceeds from the granting of such easement were properly reported as a long-term capital gain by petitioners in the year 1950.

VIII.

Petitioners were entitled to a $5,000 charitable contribution deduction in the year 1953 for that amount paid by them to the Sacred Heart Church.

On January 8, 1953, petitioner William J. Wineberg issued his check in the amount of $5,000 as a contribution to the Sacred Heart Church at Newport, Oregon, (R. 151-2, Ex. 34-HH) and such contribution was properly claimed as a charitable or religious contribution on the income tax return filed by petitioners for the year 1953 (Ex. 4-D).

In the original deficiency notice issued by respondent on November 10, 1958, this claimed charitable contribution was not disallowed. It was only at the time of the trial several years later that the respondent filed an amended answer (R. 49) alleging for the first time that this $5,000 was not a charitable contribution, as claimed, but was a nondeductible capital expenditure.

Rule 32 of the Rules of Practice of the Tax Court (adopted pursuant to Sec. 7453 of the Internal Revenue Code of 1954) provides that the burden of proof on such new matter was on the respondent.

The testimony and other evidence on this issue was somewhat conflicting and confusing. Petitioner William J. Wineberg testified (R. 383-4) that this was a bona fide contribution, although he was not a member of that church. It is readily apparent that the contribution was made for the primary purpose of ingratiating himself with the pastor of the church so as to have an opportunity to bid on certain timber which the pastor controlled and land which the church had inherited. It is also readily apparent, however, that the $5,000 was paid to the church without any contingency; i.e., had petitioner not been the successful bidder for the land and timber, the $5,000 would have been retained by the church.

Respondent offered the testimony of a Father Rodakowski, the pastor of the church. In answer to a leading question from respondent's counsel, the pastor did affirm that two checks, totaling $18,000, were in payment for the timber and the land (R. 414). On the other hand, this witness of respondent also testified regarding his conversations with petitioner William J. Wineberg relating thereto and stated, "I told him, too, that I had wanted at least $5,000 somewheres, and he had promised me at that time that if he had a chance at the timber and the land he would see that I would get my $5,000 as a contribution of some sort to the church."

Because, as the pastor testified, petitioner had "made a contribution to the church" (R. 414), the timber was sold to him rather than to others. The pastor had previously spoken to petitioner about his making a contribution to the church in order to assist him in building his school (R. 418). The pastor estimated that the value of the timber which belonged to the heirs of the estate was $12,000 (R. 419). Of the $18,000 received by the church and the heirs of the decedent's estate during this period of time, $12,000 was paid to the heirs, and the church retained the balance of $6,000 (R. 418-9), with $5,000 representing the contribution by the petitioner and the remaining $1,000 representing the agreed value of the land (Ex. 25-Y) which was devised to the church by the decedent Peter J. Maesfrancx. At another point in his testimony the pastor indicated that others had offered $17,000 for the land and timber and that petitioner's representatives had replied, "Well, we'll give eighteen thousand." (R. 414). Documentary stamps in the aggregate amount of $14.30 (indicating the total consideration for the land and timber was $13,000—not $18,000) were affixed to the deeds (Exs. 22-V and 23-W). Since respondent had the burden of proof on this issue, the confusion on this point should have been resolved against him.

The Tax Court, citing only the *Estate of O. J. Wardwell,* 35 T.C. 433, decided that the deduction was not allowable because it was "in fact, paid for some personal benefit" (R. 191). Since the decision of the Tax Court in this case, however, the Court of Appeals for the Eighth Circuit has reversed the Tax Court and found

in favor of the taxpayer in that case. *Estate of O. J. Wardwell* v. *Commissioner,* 301 F.2d 632.

In the *Wardwell* case, the taxpayer had made a "contribution" of $7,500 to a charitable institution as a room endowment. The Tax Court had disallowed the deduction because the payment was made in anticipation of reduced charges and to secure room occupancy and, thus, made in anticipation of benefits of an economic nature. The Court of Appeals, however, held that the Tax Court had confused "motive" and "expectation" with "legal rights and consideration" and that the pledge of the funds was absolute and unconditional. The claimed deduction was allowed. The appellate court approved the dissenting opinion of Tax Court Judge Pierce, who stated:

> "Many charitable gifts, and particularly those made to local charities, yield benefits to the donor; and the existence of absolute purism in a donor's motive for making a charitable gift, is not commonly regarded to be material . . .
>
> "Moreover, solicitation of charitable gifts are frequently accompanied by a statement that they will qualify for income tax deduction by the donor, and with the further suggestion that the income tax benefits may be increased, if property or securities which have appreciated in value are given in kind. In the recent case of *Maysteel Products, Inc.,* 33 T.C. 1021, this Court upheld for deduction under the statute, gifts to charities which had been made as part of a scheme of the donors to obtain tax benefits.
>
> "Congress made provision for the deduction for charitable gifts, in order to induce and encourage the making of such gifts. See S. Rept. No. 1567, 75th Cong., 3d Sess., reprinted in 1939-1 C.B. (Part

> 2) 779, 789. And this Court has held that, "Tax provisions as to charities are begotten from motives of public policy and are not to be narrowly construed.' *Estate of J. B. Whitehead,* 3 T.C. 40, afd. 147 F.2d 977; *Helvering* v. *Bliss,* 293 U.S. 144. I believe that in applying such provisions the donor's motive for making the charitable gift is immaterial."

It is submitted that the Tax Court erred in disallowing this deduction because petitioner received some personal benefit therefrom.

CONCLUSION

Petitioners respectfully submit that Judge Scott erred in her interpretation and application of the phrase "held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" found in Section 117(a)(1) of the Internal Revenue Code of 1939, defining "capital assets", and erred in reclassifying the proceeds from the sale of timber which had been held by petitioners for many years prior thereto.

For the reasons heretofore stated, petitioners also submit that Judge Scott erred in deciding certain subsidiary issues in favor of the respondent.

The judgment of the Tax Court should be reversed and remanded to the lower court for the purpose of determining whether the transactions referred to in Section III of the Argument herein were qualifying exchanges of like properties within the purview of Section 112(b)(1) of the Internal Revenue Code of 1939.

Respectfully submitted,

Charles P. Duffy,
Davidson, Duffy & Stout,
625 Yeon Building,
Portland 4, Oregon,
Counsel for Petitioners.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

(sgd.) Charles P. Duffy
Of Attorneys for Petitioners

APPENDIX A

Summary of Timber Sales in Question

Year	Purchaser	Year of Acquisition	Sales Price	Cost	Profit
1950	Stebco Lumber Co.	1942	$ 26,253.25	$ 340.00	$ 25,913.25
	Columbia Hudson Lbr. Co.	1943	14,873.50	190.80	14,682.70
	A. J. Gross	1937	500.00	186.00	314.00
	Maloney & Lee Chambers	1941	2,700.00	100.00	2,600.00
	A. K. Wilson	1942	2,000.00	unknown†	2,000.00
	Monroe Lumber Co.				
1951	Wagner Bros. Lumber Co.	1940	13,000.00	72.00	12,928.00
	Sherman Hendrickson	1943-6	9,700.00	unknown†	9,700.00
	Downing	1944-5	1,311.62*	unknown†	1,311.62
	Graff	1946	4,170.93*	200.00	3,970.93
	Multnomah Plywood	1942	2,212.70	unknown†	2,212.70
	P & W	1943-6	4,541.65	unknown†	4,541.65
	Hogan	1939	5,020.00*	2,218.00	2,802.00
	Weinert	1944	4,690.00	unknown†	4,690.00
	Landess	1943	3,750.00	unknown†	3,750.00
1952	J. L. Ledgett				
	Peninsula Plywood	1946	1,000.00	27.17	972.83
	Swanberg	1942	1,100.00	129.00	971.00
	Morris	1936	4,650.00	180.00	4,470.00
	Ermanson	1944	3,000.00*	189.00	2,811.00
	Rice Brothers	1950	2,000.00	750.00	1,250.00
1953	Beckman	1951	1,750.00*	62.50	1,687.50
	Guy Roberts Lumber Co.	1951-2	15,938.97	8,500.00	7,438.97
	Swanberg	1946	2,000.00	unknown†	2,000.00
	Dollar & Patterson, Inc.				
	Northern Lumber Co.	1944	4,879.00	329.18	4,549.82
	Harbor Lumber Co.	1946	3,050.25*	220.00	2,830.25
			$134,091.87	$13,693.65	$120,398.22

* Involuntary sale caused by unauthorized trespass.

† No basis claimed by petitioners—entire profit reported on income tax return (R. 93, 96, 214-257).